

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LINDA L. BANKS

v.

DEPARTMENT OF THE AIR FORCE

Docket No.

DA075209014

OPINION AND ORDER

The appellant was charged with attempted theft of commissary property by deliberately failing to charge a customer for items purchased. She was removed from her position of sales store checker, Dyess Air Force Base, Texas, effective June 7, 1979. She appealed to the Dallas Field Office. The presiding official found that a preponderance of the evidence supported the agency's charge and found that the appellant failed to prove that her removal was based on racial discrimination. He affirmed the agency action.

The petition for review alleged that the decision of the presiding official was based on an erroneous interpretation of statute or regulation by the failure to provide the appellant with certain evidence, by the use of facts not in evidence and by wrongful interpretation of the facts. In its response, the agency stated that the presiding official was not in error and that there was no failure to provide evidence because the "best evidence" rule is not applicable to administrative proceedings.

The agency's evidence file includes photocopies of the transaction tape from the appellant's cash register and photocopies of the adding machine tape which was generated when the groceries were totaled after the alleged theft. The appellant protested that the originals of these tapes were not produced during the hearing.

5 C.F.R. 1201.65 provides that: "The presiding official may order any party to respond to requests for the admission of the genuineness of any relevant documents identified within the request . . ." The presiding official noted the appellant's objection but admitted copies of the documents in question into evidence after they were identified by a witness who was familiar with them. TR at 40-43.

This ruling was in accord with Rule 1003 of the Federal Rules of Evidence which provides that a duplicate (photocopy) is admissible to the same extent as an original unless there is a genuine question raised as to the authenticity of the original. The appellant has not questioned the admissibility of the original

documents; rather she has demanded them. Moreover, 5 C.F.R. 1201.62 grants the presiding official authority to exclude evidence which is irrelevant, immaterial or unduly repetitious. Therefore, the Board finds the presiding official's acceptance of the documents at issue as proper.

The petition for review protests the fact that the agency did not prove the appellant's intent to commit the act or her guilt in regard to the charges against her. However, the presiding official reviewed all of the evidence and found that a preponderance of the evidence indicated that the appellant had in fact engaged in the conduct with which she was charged. The Board's regulations require that the agency action must be sustained if it is supported by a preponderance of the evidence. 5 C.F.R. 1201.56(a) (ii). We find no error regarding this finding.

Three harmful procedural errors were asserted by the appellant, two of which had been specifically discussed and rejected by the presiding official. The appellant has cited no law or regulation which has been erroneously interpreted by the presiding official and therefore has given us no reason to review these two claims. The third claim, that the letter of proposed removal lacked specificity, was submitted for the first time in the petition for review. In regard to this claim, the appellant has presented no new evidence which was not available when the record was closed which would justify consideration of this issue. Therefore, we will not review this claim of harmful error.

The appellant also contended that the presiding official relied on facts not in evidence when he determined that the evidence did not support the appellant's theory that groceries from another customer's shopping cart were included in the grocery recomputation made after the alleged conduct of the appellant had occurred. The presiding official had based his conclusion on this issue in part on the fact that the customer involved in the incident did not object to or question any of the items included in the recomputation of goods.

Although it is true that the customer in question did not testify at the hearing, and was not requested to testify, the file contains a statement given by that customer to a special agent on April 17, 1979, which supports the presiding official's conclusion. The customer's reaction was also described by another person who did testify. TR at 100. Hearsay is admissible in administrative hearings. *Wathen v. United States*, 527 F.2d 1191, 1199 (Ct. Cl. 1975), cert. denied 429 U.S. 8211 (1976). Therefore, we find no basis to review the presiding official's determination on this issue.

Finally, the appellant contended that a preponderance of the evidence is in the appellant's favor regarding testimony in the case

pertaining to certain facts. She argued that three people (including the appellant) testified in the appellant's favor and two supported the agency's contentions. The decision of the presiding official on this point will not be reviewed. "... (W)hen questions of credibility are presented, due deference must necessarily be given to the assessment of the presiding official who was present to hear and observe the demeanor of the witnesses." *Weaver v. Department of the Navy*, 2 MSPB 297, 299 (1980).

The appellant has failed to establish that new evidence is now available that was not available when the record was closed or that the decision of the presiding official was based on an erroneous interpretation of statute or regulation. Therefore the appellant has not met the criteria for review under the Board's regulations at 5 C.F.R. 1201.115.

Accordingly, the petition for review is DENIED.

The appellant has a right to petition the Equal Employment Opportunity Commission to consider this decision on the issue of discrimination. Such petition must be filed in writing with the Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506. The appellant also has the right to file a civil action under the anti-discrimination laws in any appropriate U.S. District Court. Either a petition to EEOC or a civil action in a U.S. District Court must be filed no later than 30 days after the appellant's receipt of this decision.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of this decision must be filed in the appropriate U.S. court of appeals or in the U.S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., November 26, 1980